IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff

v. DECISION AND ORDER

ALEX J. RAINERI,

Defendant.

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INTRODUCTION

This decision and order addresses the third unit or group of defendant Raineri's pretrial motions, those bearing upon the place and manner of trial. These motions are:

1) defendant's motion for transfer of the trial to another location within the Western

District of Wisconsin;

2) defendant's motion for disqualification of the Honorable Barbara B. Crabb as trial judge; and

3) defendant's motion for severance and separate trial of each of the five counts of the indictment.

DECISION

Motion for Transfer of Trial

Rule 18, F.R.Cr.P., provides as follows:

> Rule 18. Place of Prosecution and Trial.
> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Pursuant to this Rule, defendant has moved for an order transferring the trial in this

case from Madison, Wisconsin, to alternatively, Hurley, Wisconsin (where the crimes in Counts I, II, III, and V of the indictment were alleged to have occurred and where the defendant resides), or Superior, Wisconsin. 1/

Defendant argues that a transfer of trial to Hurley or Superior would: 1) further the interest of justice by permitting defendant to be tried by a jury of his peers selected from the area where he resides, where he has been elected to public office as district attorney and state court judge, and where most of the alleged offenses occurred; 2/

1/ Hurley and Superior, Wisconsin were the two cities to which transfer of the trial was requested in defendant's

motion papers. Accordingly, the government's opposing brief and affidavits addressed the question of possible transfer to those cities only. In his reply brief, however, defendant argued in addition -- and in a thoroughly confusing fashion -- that, as a "final alternative" to trial in those two cities the court should consider a transfer of trial to Wausau, Wisconsin, or the selection of a jury in Hurley with subsequent trial in Madison. I have no idea which of these two alternatives defendant meant as his real "final alternative" to trial in either Hurley or Superior, but I need not decide that question.

These "final alternative(s)" were raised for the first time in a reply memorandum submitted to the court more than a month after the motion's filing and well after the government's opposing brief and affidavits had been submitted pursuant to the court's briefing schedule. The assertion of these alternatives to the original motion was untimely, and they will not be considered by the court. If I were to consider them, I would note as a preliminary matter that their very assertion substantially undercuts defendant's argument that Hurley or Superior are the only trial venues convenient to defendant and the witnesses.

2/ The crime alleged in Count IV of the indictment, the perjury count, apparently occurred at the session of the Grand Jury in Madison. As noted above, Counts I, II, III and V involve offenses allegedly committed in Hurley.

and 20 result in far greater convenience for the defendant and the witnesses. The government argues in opposition that defendant has no legal entitlement to trial in, or a jury selected from, the Hurley-Superior area of this district, and that a trial in either Hurley or Superior -- while perhaps more convenient to a majority of the witnesses in terms of their travel time from place of residence to court -- could be expected to produce substantial delays during trial because of inadequate library resources in those cities.

The parties have submitted affidavits material to the transfer motion. From them,

and by the judicial notice, [3] I find the following relevant facts:

Parties and counsel. The defendant resides in the City of Hurley, Iron County, Wisconsin. I take judicial notice that his attorneys maintain offices in Madison and Wausau, Wisconsin, and that the office of the United States Attorney for this district is located in Madison. The United States Attorney has no facilities, including library facilities, in Hurley or Superior.

Witnesses. Although the total number of witnesses likely to be called at trial is unclear, it appears that the majority of witnesses may come from the Hurley area. [4] The govern-

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3/ Judicially noticed facts will be specifically identified.

4/ My findings on witnesses from the Hurley area is necessarily imprecise. The gov-

> ernment has not stated how many of its witnesses will come from that locale. Defense counsel has made two factual statements in this regard, but they are inconsistent; i.e., defense counsel has stated his belief that "the vast majority of the witnesses in this case reside in Iron County, Wisconsin," but has also stated in the same affidavit that "approximately 50 witnesses will be called . . . most of whom reside in or around Ashland, Hurley, Ironwood or Hibbings (sic), Minnesota." I cannot discern the distinction between counsel's use of "the vast majority" and "most" in these statements. I take judicial notice, however, that of the four cities identified in the latter statement, only Hurley lies within Iron County, Wisconsin. Ashland, Wisconsin is in an adjacent county and Ironwood, Michigan is contiguous to Hurley but across the Michigan-Wisconsin border.

ment intends to call at least four witnesses from the Madison area and four to six witnesses from outside Wisconsin. Defendant intends to call several witnesses from California, Nevada, and other out-of-state locations.

I take judicial notice that the highway driving distance between Madison and Hurley is

423 miles and between Hurley and Superior is 167 miles. I take further notice that an airport is located in Madison that is served by several commercial air carriers with daily direct and connection flights to destinations both within and without Wisconsin.

The Western District and its jury selection division. I take judicial notice that 28 U.S.C. § 129 divides Wisconsin into Western and Eastern districts. Section 129 does not divide the Western District of Wisconsin into divisions; it merely names places of holding court (Madison and Superior being among them). I take further notice that under the Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(e) (2), "in judicial districts where there are no statutory divisions," a "division" is defined as "such counties, parishes, or similar political subdivisions surrounding

the places where court is held as the district court plan shall determine. PROVIDED, That each county, parish or similar political subdivision shall be included in some such division." (emphasis added). Pursuant to the Act, this district court has adopted a Plan for the Random Selection of Grand and Petit Jurors that divides the Western District into several divisions for jury selection purposes. Iron County and Douglas County (in which Superior, Wisconsin lies) are included within the Plan's "Superior Division." Madison is included within the Plan's "Madison Division."

Courtroom facilities. I take judicial notice that the only full-time place of court within this district is Madison, where the court's chambers, the clerk's office, and the U.S. Marshal's office are located. There

is no federal court facility in Hurley. The federal court facility in Superior no longer houses a functioning courtroom. It has been declared surplus property; its library and all courtroom furniture have been removed from the building. I take judicial notice that county courthouses are located in Hurley and Superior.

Library facilities. The United States Attorney has no library in those cities and that the court maintains a substantial library in Madison. The Iron County Law Library is not a functioning federal law library. 5/ The Douglas County Law Library has a more adequate collection of federal

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5/ The Iron County Law Library does not contain the following materials: United States Reports, Federal Supplement, Federal Reporter (2d Series), United States Code Annotated, Shepherd's

Citations, Modern Federal Practice Digest, and West's Federal Practice Digest.

legal materials, but lacks significant research tools. 6/

The St. Louis County Courthouse and a federal courthouse of the United States District Court for the District of Minnesota are both located in Duluth, Minnesota, approximately five miles from the former federal court facility in Superior, Wisconsin.

A meeting on August 19, 1980, the Board of Commissioners for Gogebic County, Michigan (which is adjacent to Iron County, Wisconsin) authorized use of the Gogebic County Law Library by defense counsel Daniel Linehan and established a daily rate of $100.00 for such use. Attorney Daniel Linehan has stated

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6/ The Douglas County Law Library does contain the following volumes: United States Reports, Federal Supplement,

United States Code Annotated, and Federal Reporter (2d Series). The library, however, does not contain the following materials: Shepherd's Citations, Modern Federal Practice Digest, and West's Federal Practice Digest.

The materials not available in the Douglas County Law Library can be found in St. Louis County Law Library in the adjacent city of Duluth, Minnesota, between the hours of 8:00 a.m. and 4:30 p.m. on weekdays.

that it is his understanding that the fee would also cover daily use of the library by both the prosecution and this court.7/

Defense counsel Gene Linehan possesses a set of the United States Code Annotated which he will make available to the prosecution and the court during any trial in

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7/ The action of the Gogebic County Board of Commissioners and Attorney Daniel Linehan's understanding of it are reflected in correspondence submitted to this court by Attorney Linehan.

Hurley or Superior as no other set is easily accessible. Defense counsel Daniel Linehan has promised to move to Hurley any federal research tools which the United States Attorney believes necessary.

On the basis of these factual findings, I now proceed to consideration of the legal issues raised by defendant's motion for intradistrict transfer of the trial in this case.

While defendant places substantial reliance upon the argument that transfer is appropriate under Rule 18, F.R.Cr.P., because trial in Hurley or Superior will be more convenient to defendant and the witnesses, it is also clear that defendant believes he has a "right" to "trial in the division wher the offense alleg-

edly occurred."[8/] Defendant's latter argument will be considered first.

Defendant apparently misapprehends the constitutional and statutory context in which Rule 18 operates. The constitutional provisions controlling venue (Article III, §2, clause 3) and vicinage (Sixth Amendment) make the state and district of a crime's commission the appropriate place for jury trial in a federal prosecution. The former provision places venue "in the state where the said crimes shall have been committed." The latter provision guarantees the right to trial "by an impartial jury of the state and district wherein the crime shall have been committed." Neither constitu-

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8/ Defendant's Reply Memorandum, at 48.

tional provision makes any reference to statutory divisions within a judicial district. It has therefore been recognized that "when a district is not separated into divisions . . . trial at any place within the district is allowable under the Sixth Amendment and the first sentence of F.R.Cr.P. 18." United States v. Fernandez, 480 F.2d 726, 730 (2d cir. 1973). The same is true for districts that have been separated into judicial divisions; "the accused has no right to a trial held in a particular division, even one where the crime occurred, since the constitutional guarantee is written in terms of districts." Zicarelli v. Gray, 543 F.2d 466, 479 (3d Cir. 1976) (footnote citations omitted). The district, and not a statutory division of it, is the

constitutionally prescribed unit of [redacted] venue in federal criminal cases. United States v. James, 528 F. 2d 999, 1021 (5th Cir. 1976).

The Jury Selection and Service Act of 1968 neither conflicts with nor expands these constitutional requirements. The Act, of course, declares it to be national policy that all litigants in federal jury cases "shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. §1861.[9/] This language does not create a requirement that a trial court convene not only in the district

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9/ As noticed in my factual findings, for purposes of the Act, "division" is defined as:

> (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine; PROVIDED, That each county, parish, or similar political subdivision shall be included in some such division;
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> 28 U.S.C. §1869(e) (emphasis added).

but also in the division where the crime occurred. United States v. Cates, 485 F. 2d 26, 27-28 (1st Cir. 1974). Instead, it merely provides that the grand or petit jurors, as the case may be, be selected from a fair cross-section of the community in either the district or division where the jury sits is established not by the Act, but by the Constitution and Rule 18.

If the place of trial in this case were to be fixed at Superior or Hurley, the jury would be selected from persons residing in the "Superior division," a multi-county division created by the court's Plan for the Random Selection of Grand and Petit Jurors, which was adopted in compliance with the Jury Selection and Service Act. "Divisions" created by the court's Plan are for jury selection purposes and are obviously different than a congressionally-created statutory division of a federal judicial district. See United States v. Florence, 456 F.2d 46, 48 (4th Cir. 1972). If the place of trial in this case remains fixed at Madison, the jury will be selected from persons residing in the Plan's "Madison division."

In either event, jury selection will be conducted in compliance with the requirements of the Act and the Constitution. When a court Plan under the Act creates divisions for jury selection purposes and the place of trial is properly fixed at a location within one such division, a defendant has no statutory or constitutional right to a jury selected from another division, not even when the defendant's residence and the place of the alleged crime are both within the other jury selection division. Id., at 48-50.

The offenses charged in this case are alleged to have occurred with the Western District of Wisconsin. The place of trial may properly be fixed at Madison. Defendant has no constitutional or statutory right either to venue in the "Superior division" or to a jury selected from within that

"division."

Defendant has raised more substantial arguments for transfer of trial through an exercise of the court's discretionary powers under Rule 18, F.R.Cr.P. A thorough review of the relevant facts and legal authorities has convinced me, however, that trial of this case is more appropriate in Madison than in either Hurley or Superior.

Rule 18 provides that the place of a federal criminal trial be fixed within a district "with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." Rule 18 does not vest a defendant with a right to choose a particular place of trial, Florence, 456 F.2d at 50; Houston v. United States, 419 F.2d 30, 33 (5th Cir. 1969), but grants instead "a discretionary power to the

court to be exercised upon a showing of good cause." Id. Accord, United States v. Lewis, 504 F.2d 92, 97 (6th Cir. 1974).

I am willing to accept defendant's assertion that trial in Hurley or Superior would be more convenient for defendant and the majority of his witnesses in terms of travel time and expense in coming to Madison, although I note that defendant has offered no factual substantiation for his assertion in brief that he "cannot endure" the cost of housing witnesses in Madison hotels during trial. In accepting defendant's position on the greater convenience (again, in terms of travel time and expense) of a Hurley or Superior venue, I have considered only the convenience of defendant and his witnesses, for this appears to have been the construction of the Rule intended by

its drafters. See 1966 Advisory Committee Note to Rule 18.

The logistical problems with a trial in Hurley or Superior, however, would likely be severe. I believe these problems would lead inevitably to a much longer trial than could be had in Madison and therefore produce considerable inconvenience for the witnesses of both parties.

If trial were held in Hurley or Superior, the court and Counsel would be working without an adequate federal research library close at hand. This is not a problem that is satisfactorily solved by traveling to a library in an adjacent city, whether an extortionate fee is exacted or not for its use; nor is it solved by defense counsel's agreement to provide and deliver library materials from their own collections (a

suggestion that I suspect is easier to make than hono). It is unreasonable to expect a lengthy trial to be conducted efficiently and properly under such circumstances, and I believe the government is correct in anticipating that a trial in Hurley or Superior would be punctuated by lengthy adjournments while counsel and the court struggle as best they can to secure adequate references. No such problem or delays would likely be encountered in Madison. For this compelling rationale, I cannot conclude that trial in Hurley or Superior would be more convenient for defendant and his witnesses or in furtherance of the prompt administration of justice.

Moreover, there are no federal court facilities in either of the two cities proposed for transfer. While I assume that

with time some arrangement could perhaps be made for the use of space in county courthouses in Hurley of Superior, I find it difficult to conceive that the drafters of Rule 18 ever intended that an intradistrict transfer of a federal trial be granted to venues having no federal court facilities.[10/]

I believe I have given "due regard to the convenience of the defendant and the witnesses," as required by Rule 18, F.R.Cr. P. The consideration I have given to the practical problems of a trial in Hurley or Superior does not reflect a primary concern for the government's convenience, see United States v. Gurney, 393 F. Supp. 688, 706 (M.D. Fla. 19740, or the court's. Instead I have

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10/ I note in this respect that 28 U.S.C.

> §142 mandates that federal court be held "only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States." Whether this statute is a definite legal impendiment to defendant's requested transfer of trial is a question the court need not decide.

concluded that a trial in either of the two requested locations would result in far greater inconvenience to defendant and the witnesses than can reasonably be expected in Madison. Defendant's transfer motion should be denied.

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1394

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEX J. RAINERI,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 80 CR 29, Barbara J. Crabb, *Judge.*

ARGUED SEPTEMBER 15, 1981—DECIDED FEBRUARY 8, 1982

Before CUMMINGS, *Chief Judge*, FAIRCHILD, *Senior Circuit Judge*, and PELL, *Circuit Judge.*

FAIRCHILD, *Senior Circuit Judge.* After hearing the testimony and deliberating upon the evidence, a jury at Madison, Wisconsin, found the defendant guilty on all five counts of an indictment. On appeal, he raises numerous issues. We affirm the convictions.

The first three counts charged the defendant with having caused travel and the use of a facility in interstate commerce to promote a Hurley, Wisconsin, business enterprise involving illegal prostitution.[1] The fourth count charged that he had knowingly made false and material declarations before a federal grand jury.[2] The

[1] 18 U.S.C. §§ 2 and 1952.
[2] 18 U.S.C. § 1623.

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fifth charged that the defendant had endeavored to obstruct the administration of justice by having a prospective grand jury witness threatened in connection with her prospective testimony.[3]

The evidence showed the defendant's extensive involvement in operating the Showbar, a Hurley, Wisconsin, business enterprise involving prostitution. It also showed that certain checks issued in promoting that enterprise and some linen used on the beds where the prostitutes worked had crossed state lines. Trial evidence also demonstrated that the defendant testified falsely before the grand jury when he stated that he did not travel to and from Reno, Nevada, with Cira Gasbarri in September and October, 1978. There was also proof that after the grand jury asked the defendant whether Patricia Colossaco, a Showbar bartender, had ever told him that there was prostitution at the Showbar, he told Colossaco's brother to tell her to quit telling lies about the defendant, to keep her mouth shut, and if she did not listen to her brother, the defendant would get someone else to talk to her.

The defendant's arguments fall into three categories: objections to pretrial rulings; disputes over trial rulings; and challenges to the sufficiency of the evidence.

I

PRETRIAL RULINGS

A. Location of Trial

Raineri moved to transfer the trial of this case from Madison to Hurley or Superior. A magistrate denied the motion after assessing the probable convenience and inconvenience to defendant resulting from trial at either of those locations. The district court denied reconsideration. *United States v. Raineri*, 521 F.Supp. 30, 32, 33 (W.D. Wis. 1980).

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[3] 18 U.S.C. § 1503.

Rule 18, Fed. R. Crim. P., requires the court to "fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice."

We are not persuaded that there was an abuse of discretion. The magistrate concluded, for reasons set forth in his decision, that trial at either of the requested locations would result in greater inconvenience to defendant and the witnesses. Moreover Rule 18 requires due regard to the prompt administration of justice. In our view this requires consideration of the disruption of the functioning of the court caused by trial away from its customary headquarters.

Although defendant and a number of expected witnesses lived at Hurley, approximately 300 miles north of Madison, no federal court quarters exist there. The former federal courtroom at Superior, one of the places specified by statute for holding court, and approximately 100 miles west of Hurley, has been dismantled The volume of cases in the Western District of Wisconsin and the limited personnel, facilities, and other resources available for dealing with this work have resulted in an increased centralization of judicial activity at the district's largest population and litigation center, Madison, where both the only district judge in regular active service at the time of trial and the district's only senior judge reside. In view of these facts, the adverse effect on the prompt administration of justice of holding a trial at Superior or Hurley must be significant, even assuming availability of a state court courtroom at either of these places without cost to the United States. *See* 28 U.S.C. § 142.[4]

[4] The legitimate factors which have led to the concentration of judicial activity at the Western District's Madison headquarters and the consequent dismantling of other federal courthouses distinguish this case from *United States v. Fernandez*, 480 F.2d 726, 730 (2d Cir. 1973), which expressed disapproval when the only person convenienced by a trial away from the headquarters of a muiti-judge district was the judge to whom the case had been assigned, and *United States v. Burns*, 662 F.2d 1378 (11th Cir. 1981).

B. Jury Selection

Defendant also argues that the Jury Selection Plan, under which his jury was selected, no longer complies with the Jury Selection and Service Act, 28 U.S.C. §§ 1861-69. Specifically, the claim is that citizens residing in many counties of the district are not currently and probably never will be considered for service on a petit jury.

The situation on which defendant predicates his challenge may be described as follows:

There are five statutory places for holding court within the district: Eau Claire, La Crosse, Madison, Superior, and Wausau. 28 U.S.C. § 130(b). In years past, the bulk of activity was at Madison, but jury trials were held to some extent at the other places. When the district court adopted its Jury Selection Plan under the Act, it placed every county in one of five "divisions," each of which surrounded one of the five places where court was held. There are no statutory divisions in the district, and the "divisions" in the Plan complied with § 1869(e)(2). Although grand jurors are selected from throughout the district, petit jurors are selected from the "division" in which the place of trial is located. As time went by the caseload for the district (with only one judgeship authorized until 1978) increased so as to become one of the highest per-judge caseloads in the nation. More and more of the judicial activity was necessarily concentrated at Madison. In recent years trials have come to be held only at Madison, except for some at Eau Claire. The district court quarters in the other places have been closed.

Defendant points to the policy stated in § 1861 "that all citizens shall have the opportunity to be considered for service on . . . petit juries . . . ." Section 1863(a) requires that a district Plan "shall be designed to achieve the objectives" of § 1861. Defendant plausibly asserts that currently, at least, residents of the La Crosse, Superior, and Wausau divisions are not considered for service on petit juries. Essentially this is a claim that a plan which originally complied with the Act has fallen

away from compliance because of changed circumstances.

Defendant's motion to change the place of trial would not have remedied the situation, except in the sense that some residents of the Superior division would have been members of his jury. In any event his motion did not preserve his claim. Congress prescribed a motion to stay proceedings as the exclusive means by which an accused may challenge a petit jury on the ground that it was not selected in conformity with the Act. 28 U.S.C. § 1867(a), (d), and (e).

Defendant did move to dismiss the indictment on the statutory ground just described, also asserting a constitutional right to trial by a jury drawn from the entire district, a claim he no longer presses. The motion was denied. *United States v. Raineri*, 521 F.Supp. 30, 32 33, 36-38. A motion to dismiss the indictment is included in § 1867(a) and (e) as one of the exclusive remedies for challenging a jury not selected in conformity with the Act.

The text of § 1867(d)[5] makes clear that although the remedy for noncompliance in grand jury selection may be either a stay pending a conforming selection of a grand jury or a dismissal of the indictment, the only remedy for noncompliance in the selection of a petit jury is a stay pending the selection of a petit jury in conformity with the Act. We conclude, therefore, that the exclusive procedure for a challenge to the selection of petit jurors is a motion for stay of proceedings.

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[5] 28 U.S.C. § 1867(d) provides in part: "If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title."

The magistrate concluded that although petit jurors are "routinely" selected in only two divisions, the possibility that trials might be held at some time in the La Crosse, Superior, or Wausau divisions keeps the district's Jury Selection Plan in compliance with the Act. Apparently the district court agreed. In addition there may be some question whether Congress intended that a litigant whose jury was otherwise properly selected from a division of a district could challenge the particular type of defect alleged here, involving, as it would, interests of citizens in an opportunity to be considered for service rather than the more traditional interests of litigants in the jury selection process.

Because defendant did not resort to the exclusive remedy provided, we do not reach either of these questions.

C. The Speedy Trial Act

The defendant asserts that the commencement of trial on November 24, 1980, more than five months after both the June 23 arraignment and the June 6 indictment violated the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. That act required the trial to begin within seventy days of the arraignment; 18 U.S.C. § 3161(c)(1); but excluded from the seventy days certain periods of delay. 18 U.S.C. § 3161(h). One provision excludes the delay between the filing and the prompt disposition of any pretrial motion. 18 U.S.C. § 3161(h)(1)(F). Another excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(J). The defendant filed twelve motions on June 23 and seven motions on July 7, the last day on which the magistrate's June 23 pretrial order allowed the parties to file motions. In accord with the magistrate's pretrial order, the prosecution responded to the motions on July 18. The defendant, filed a July 25 motion requesting the disqualification of the district judge; and a July 28 affidavit in support of his various motions. On August 1, the prosecutor filed the final affidavit in opposition to the defendant's pretrial motions.

This affidavit responded in part to the defendant's July 25 motion. Thus, the period from June 23 until August 1 does not count toward the seventy days because it was occupied with the prompt disposition of the motions the defendant filed on three different dates. 18 U.S.C. § 3161(h)(1)(F).

The magistrate had some of these motions under advisement until October 28. (He had decided some of them and made recommendations on others on October 3, October 7, October 10, and October 15.) It is reasonable to attribute and exclude thirty of the days between August 1 and October 28 to the motions under advisement. 18 U.S.C. § 3161(h)(1)(F) & (J).[6] *United States v. Regilio*, No. 81-1618, slip op. at 4 (7th Cir., Dec. 28, 1981); *United States v. Brim*, 630 F.2d 1307. 1311-13 (8th Cir. 1980). *See also Furlow v. United States*, 644 F.2d 764, 768 (9th Cir. 1981). Thus, the seventy-day period may be counted from September 1.

On October 3, the magistrate partially granted one of the defendant's discovery motions. Information disclosed as a result of this decision led the defendant, on October 7, to file another motion to dismiss. The October 7 motion stopped the Speedy Trial clock at the point when thirty-seven days had elapsed. On November 10, the court denied the motion to dismiss. Thirty of the intervening days are reasonably attributed to the prompt determination of that motion and are excluded. 18 U.S.C. § 3161(h)(1)(F) & (J). Thus, by November 10, for purposes of the Speedy Trial Act, forty-one days had elapsed. Under these circumstances, commencement of the trial on November 24 did not violate the Speedy Trial Act.

The defendant urges that the magistrate's June 23 pretrial order requires a different result. That order provided that trial commence on August 29. The order also provided that the magistrate would not extend the

[6] Our calculations disclose that the trial commenced fifteen days before the Speedy Trial Act deadline. Thus even if the time between July 25 and August 1 must be considered as part of the period under advisement, there is no Speedy Trial Act violation.

time set by the order, absent a finding that the ends of justice served by an extension outweighed the best interest of the public and the defendant in a speedy trial. On July 29, the trial date was cancelled, but the finding described above was not expressly made. This cancellation is entirely understandable, coming as it did, shortly after the defendant filed a late motion and a separate late affidavit in support of his earlier motions. On August 29, the original trial date, the defendant's numerous motions still burdened the magistrate.

The language in the magistrate's order concerning the finding as a prerequisite to an extension was doubtless borrowed from 18 U.S.C. § 3161(h)(8)(A). The inclusion of this language in the order did not bind the court to a standard more rigid than the statute.

D. Joinder

1. Rule 8

The defendant asserts that Rule 8, Fed. R. Crim. P. does not authorize joinder of Counts IV and V (perjury and causing a witness to be threatened) with Counts I, II, and III (causing interstate travel and use of interstate facilities to promote a prostitution enterprise). Rule 8(a) authorizes joinder where "offenses . . . are based on . . . two or more acts or transactions connected together or constituting parts of a common scheme or plan."

There is obviously a degree of connection between the acts charged in the five counts. The expected proof would show Travel Act offenses followed by perjury and threatening of a witness for the purpose of escaping prosecution. In determining whether the connection is sufficient for the purpose of Rule 8(a) "the court should be guided by the extent of evidentiary overlap." *United States v. Zouras*, 497 F.2d 1115, 1122 (7th Cir. 1974). Proof of the Travel Act counts tended to show motive for the charged perjury and threat, and proof of the perjury and threat tended to show defendant's awareness of guilt of the Travel Act counts. Specifically, significant testimony in establishing defendant's involvement in the

prostitution enterprise came from the witness who was threatened, and the perjury tended to persuade the grand jury that defendant's relationship with Ms. Gasbarri was casual and thus to divert it from discovering the close relationship between them incidental to the operation of the enterprise.

We think the criterion quoted from Rule 8(a) was fulfilled.

2. Rule 14

The defendant argues that even if Rule 8, Fed.R. Crim.P., permits joinder, the district court should, under Rule 14, Fed.R.Crim.P., have granted his request for relief from prejudicial joinder and ordered trial of Counts I, II, and III separately from Counts IV and V. We may reverse a denial of Rule 14 relief only if the trial court has abused its discretion or committed plain error affecting substantive rights. *United States v. Kopel*, 552 F.2d 1265, 1272 (7th Cir.), *cert. denied*, 434 U.S. 970 (1977). Such a reversal would entail finding "that the facts and law presented to the trial judge at the time of the motion for severance demonstrated that a trial under joinder was likely to be unfair and that the trial was in fact unfair." *United States v. Kahn*, 381 F.2d 824, 841 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967). *See also United States v. Pacente*, 503 F.2d 543, 546 (7th Cir.), *cert. denied*, 419 U.S. 1048 (1974).

The defendant alleges that credibility was the main issue in this trial and that the jury failed to fully credit his denials of promoting an illegal prostitution enterprise because he was charged with perjury and obstruction of justice and because the prosecution's opening argument posited that the defendant's involvement in the illegal enterprise furnished the motive for his perjury and obstruction of justice. We are not persuaded that the joinder of charges which, *if proved*, might damage his credibility, deprived him of a fair trial, nor that the district court abused its discretion.

E. Psychiatric Examination

The defendant claims that the court committed reversible error by its denial of his request to compel a psychiatric examination of Gasbarri. The district court has broad discretion in determining whether to compel a witness to undergo a psychiatric examination. *United States v. Jackson*, 576 F.2d 46, 48 (5th Cir. 1978); *United States v. Russo*, 442 F.2d 498, 503 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972). *See United States v. LaBarbera*, 463 F.2d 988, 990 (7th Cir. 1972); *United States v. Riley*, 657 F.2d 1377, 1387 (8th Cir. 1981). In exercising this discretion the court must consider the infringement on a witness's privacy, the opportunity for harassment, and the possibility that an examination will hamper law enforcement by deterring witnesses from coming forward. *United States v. Jackson*, 576 F.2d at 49; *United States v. Butler*, 481 F.2d 531, 534 (D.C. Cir. 1973).

We have examined defendant's motion and very general supporting affidavit filed at the time of arraignment and cited in his brief. We have also examined the magistrate's report on the motion. We note that on the crucial issues Gasbarri's testimony was corroborated by other witnesses or by documents. We are not persuaded that there was any abuse of discretion.

II

TRIAL RULINGS

A. Medical Records

1. Privilege

The defendant takes issue with the trial court's rejection of his counsel's attempts to introduce into evidence as an exhibit the Hope Community Mental Health Center's (Center) records regarding Cira Gasbarri.

Pursuant to a subpoena, the Center provided the records to the grand jury but indicated that they were confidential and could not be turned over to any other

entity.[7] The Center's assertion of a statutory privilege conflicted with the prosecution's obligation to turn over exculpatory material. Therefore, the prosecution placed before the magistrate the question of the disposition of those records. In a July 24, 1980 letter to the magistrate, the prosecutor asserted good cause to disclose the data recording Gasbarri's treatment, diagnosis, and prognosis and the dates of her enrollment, attendance, and discharge. *See* 42 U.S.C. § 4582(b)(2)(C); 42 C.F.R. § 2.1-2.66. The prosecution suggested an order directing the turnover of such data to the court for review and possible disclosure to the defendant. On July 31, the magistrate ordered the Center to disclose such data to him. The Center reported the information to the magistrate on August 11. On September 4, the magistrate ordered the release of this limited information to defense counsel.

This information disclosed that: (1) Gasbarri had been hospitalized at the Center from December 6, 1979 to December 21, 1979, a period subsequent to the 1978 events about which she testified at trial; (2) at the time of her hospitalization, her diagnosis had been psychotic depression reaction transient situational disturbance; (3) during her hospitalization, her treatment consisted of individual and group therapy and 200 mg. of Mellaril every hour for nine days; (4) her prognosis was good; (5) she received outpatient treatment on December 31, 1979 and in 1980 on January 7, 14, and 29, February 8, March 31, April 14, June 20, and July 14; (6) during her outpatient treatment, she received individual therapy with 25 mg. of Mellaril to be taken twice a day as needed.

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[7] The records contained a statement that "This information has been disclosed to you from records whose confidentiality is protected by [California] Section 5328 Welfare and Institutions Code; and/or federal law. Federal regulations (42 C.F.R. part 2) prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose."

The magistrate suggested getting Gasbarri's position on turning over the remainder of the records. After Gasbarri objected, the prosecutor, in a letter to the magistrate, proposed to return the records to the Center and suggested that defense counsel subpoena the records to resolve the question of privilege in advance of trial under Fed.R.Crim.P. 17.1. The prosecutor sent a copy of the letter to the defendant's lawyers. The magistrate scheduled a hearing on the issue, but cancelled it when defense counsel advised him that they did not object to the proposal stated in the prosecutor's letter (A. 22). Defense counsel did not subpoena the records before trial.

After Gasbarri testified, defense counsel subpoenaed the records. The judge received them on December 4 and allowed defense counsel access to the records. On December 9, the prosecution submitted a memorandum concerning the records. On the next day, the judge stated that, by oversight, she had not opened the sealed materials and read all of the proceedings before the magistrate in connection with the medical records in question until the previous evening. She indicated that she had erred in permitting access to the records. The judge required the return of all copies of the records and stated that the regulations prohibited dissemination until a showing of justification for the release. After criticizing defense counsel for failing to deal with the privilege problem before trial, she said that she would have to hear testimony from an official of the Center before she could determine whether to release the records. The judge then allowed defense counsel an opportunity to explain why they had failed to raise and resolve the privilege question before trial. (Tr. 12/10/80 p. 445.) When defense counsel offered no satisfactory explanation, the court ruled that their failure precluded them from disputing in mid-trial the Center's assertion that the records were privileged. (Tr. 12/10/80 pp. 462-63 483: 12/15/80 pp. 693-94.)

In view of defense counsel's consent to the suggestion to resolve the claim of privilege before trial and their failure to do so, the court did not abuse its discretion

when it refused to allow defense counsel to interrupt the trial to challenge whether the records were privileged. *See United States v. Jackson*, 621 F.2d 216, 220 (5th Cir. 1980); *United States v. Scanland*, 495 F.2d 1104, 1106 (5th Cir. 1974).

We do not have the records before us. From the remarks of the attorneys at the trial we have determined that in addition to the information disclosed pursuant to the magistrate's order, the records contained: an admitting diagnosis of chronic paranoid schizophrenic (Tr. 12/10/80 p. 453); reference to a prior hospitalization at Camarillo State Hospital in California (Tr. 12/11/80 p. 620); summaries of Gasbarri's conversations including some statements attributed to her about her desire to expose a Wisconsin attorney (Tr. 12/8/80 p. 5). The prosecution conceded the authenticity of these records but opposed their admission not only on the grounds of privilege but also on the grounds of hearsay and insufficient foundation to determine the qualifications of the persons who had reached the recorded conclusions.

After several unsuccessful efforts to have the court reconsider its ruling, defense counsel called two witnesses from the Center. George Paz, a staff psychiatrist and Gasbarri's treating physician at the Center, asserted a statutory privilege under 21 U.S.C. § 1175. The court ordered him to answer those questions necessary to determine whether the privilege applied to his testimony and that of Constance Williams, the clinical director and psychiatric socialworker, who treated Gasbarri and wrote most of the records in question. Paz then testified that Gasbarri had not participated in a drug or alcohol abuse program at the Center. The court noted that the statutory privilege in question applied only to such programs. Williams and Paz then testified about Gasbarri's involuntary commitment to the Camarillo State Hospital in 1979, some months prior to her admission to the Center. Paz reported that Gasbarri's family had become concerned after her discharge from Camarillo that they might not be able to care for her, that they needed to

have someone with her all the time, and that she was creating inter-personal conflicts with family members. Gasbarri's family brought her to Olive View County Hospital which advised hospitalization on a voluntary basis and referred Gasbarri to the Center.

Williams and Paz testified that during Gasbarri's stay at the Center her diagnosis was psychotic depressive reaction, and her treatment included doses of Mellaril. Williams said Gasbarri had made statements that she had lost some of her property and had been exploited by an attorney in Wisconsin with whom she had been friends. According to Paz, Gasbarri had difficulty responding directly to questions during her stay at the Center (Tr. 12/15/80 p. 746) and would frequently respond by starting four to ten years prior to the question. In Paz' opinion, based upon his observations of Gasbarri as an outpatient, her psychotic depressive reaction had resolved shortly after Gasbarri's discharge from the Center, but a situational disturbance continued to produce milder forms of anxiety which Paz called "situation adjustment reactions or transient situational disturbances with adjustment reaction."

The court sustained an objection to the relevance of the admitting diagnosis (Tr. 12/15/80 p. 736), a ruling the defendant does not appeal. Defense counsel never asked Paz or Williams any questions about the medical records. Nor did the defense again offer any part of the records.

The court's ruling that the statutory privilege did not bar the testimony of Paz and Williams undermined the Center's claim of privilege, but, by itself, it did not transform the court's previous decision into an abuse of discretion.

2. Effective Representation

Defense counsel's failure to qualify the medical records for admission as an exhibit does not rebut the presumption that counsel afforded the defendant adequate assistance. *United States v. Fleming*, 594 F.2d 598, 607 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979). We

measure adequacy by the totality of each case's circumstances. *United States v. Starnes*, 644 F.2d 673, 681 (7th Cir. 1981); *United States v. Phillips*, 640 F.2d 87, 92 (7th Cir.), *cert. denied*, 101 S.Ct. 2331 (1981), not by an isolated failure. Furthermore, the defendant has shown no prejudice from his counsel's failure. *See United States v. Weir*, 657 F.2d 1005, 1008 (8th Cir. 1981); *United States v. Coupez*, 603 F.2d 1347, 1350 (9th Cir. 1979).

The defendant made an extensive attack on Gasbarri's credibility and her ability accurately to perceive, recall, and relate events. This attack included evidence of excessive drinking; public lesbian acts; attempts by her to shoot the defendant and to drive her car into his; her confinement at a mental health center; her destruction of electrical outlets, television sets, and other furniture in the belief that the Mafia was after her and that the FBI was in the television, light bulbs, thermostat, telephone wires, and telephone poles; her statements that she had attended her own funeral three or four times, that she was being followed, that her home was being filled with poison gas, and that the defendant had burned the Showbar and had hired someone to kill her (the alleged hired killer categorically denied Gasbarri's statement); the diagnosis of her attending physician that in late 1979 she was undergoing a psychotic depressive reaction which may have involved delusions; and her physician's testimony that he had prescribed Mellaril for her.

In view of the testimony of George Paz and Constance Williams and the other evidence which attacked Gasbarri's credibility, the records may have added little or nothing to the extensive onslaught.

B. Gasbarri Subpoena

The prosecution called Cira Gasbarri, at that time a California resident, as its first witness. She testified and defense counsel cross-examined her on November 24 and 25. Defense counsel subpoenaed Gasbarri to reappear on December 12 as a defense witness. The prosecutor moved to quash the subpoena. The court granted the motion. The defendant advances several rationales for finding

that the trial court erred when it quashed his subpoena to recall Gasbarri.

1. Prosecution Standing

The defendant urges that the prosecution had no standing or authority to move to quash the subpoena. We disagree. A party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant's legitimate interests. *In re Grand Jury*, 619 F.2d 1022, 1027 (3rd Cir. 1980). The prosecution's standing rested upon its interest in preventing undue lengthening of the trial, undue harrassment of its witness, and prejudicial over-emphasis on Gasbarri's credibility.

2. Confrontation

The defendant argues that quashing the subpoena violated the defendant's constitutional right to confront Gasbarri. The Sixth Amendment right to confront witnesses through cross-examination "is not without some reasonable limitation within the sound discretion of the trial judge." *United States v. Hansen*, 583 F.2d 325, 332 (7th Cir.), *cert. denied*, 439 U.S. 912 (1978). When, as here, the defendant has already subjected the witness to an intense and complete cross-examination, a trial judge's refusal to recall the witness for further cross-examination does not violate the defendant's right to confront the witnesses against him. *United States ex rel. King v. Schubin*, 522 F.2d 527, 529 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *United States v. Somers*, 496 F.2d 723, 734 (3rd Cir.), *cert. denied*, 419 U.S. 832 (1974). *See Alford v. United States*, 282 U.S. 687, 694 (1931); *Faust v. United States*, 163 U.S. 452, 455 (1896).

3. Right to Call Witnesses

The defendant asserts that quashing the subpoena deprived him of the right to call Gasbarri as a witness in his favor. Unless Gasbarri would have produced relevant and material testimony which favored the defendant, the quashing of the subpoena could not have

violated the defendant's right to call witnesses in his favor. *United States v. DeStefano*, 476 F.2d 324, 330 (7th Cir. 1973).

The judge used great effort to find out whether Gasbarri's reappearance would lead to the introduction of substantive evidence. She invited defense counsel to submit a written *ex parte* statement of the substantive evidence they would seek to elicit if she allowed them to recall Gasbarri. They never responded to that invitation. We accept the court's conclusion based on defendant's earlier oral offer of proof that the defense sought to recall Gasbarri solely to impeach her further. The right to produce witnesses does not extend to such a recall.

4. Policy Arguments

The defendant argues that he should have been allowed to subpoena Gasbarri because (1) requiring a defendant to explore every possible area of cross-examination during the prosecution's case might result in defeating a motion for a judgment or a directed verdict of acquittal and (2) during cross-examination of the prosecution's initial witnesses, defense counsel may be unaware of things which become known later in the trial. These arguments have some abstract merit, but the defendant fails to show that they apply to his case. Furthermore, Fed.R.Evid. 611 lists the policy considerations which shall guide a trial court's reasonable control over the mode and order of interrogation witnesses; (1) effectiveness for the ascertainment of truth; (2) avoiding needless consumption of time; and (3) protecting witnesses from harassment or undue embarrassment. On the record before us we cannot say that the trial court departed from the standards of Rule 611.

C. The Defendant's Direct Examination

The following exchanges occurred during the defendant's direct testimony:

> BY MR. DAN LINEHAN [Counsel for the defendant]: Q. Do you remember testifying before the Grand Jury in this case?

A. Yes, I do.
Q. Do you remember being asked whether or not you flew to Reno, Nevada, with Cira Gasbarri in September of 1978?
A. Yes, I do.
Q. Do you remember being asked if you flew back to Minneapolis with Cira Gasbarri in October of '78?
A. Yes, I do.
Q. What did you answer to those questions?
A. My answer, on the way to Reno I didn't believe that I flew on the same plane with her. I believe that she flew directly to California.
Q. You said you didn't fly there with her, didn't you?
A. That was my honest belief. I didn't think that she was on the plane with me. I couldn't remember her being there.
Q. And this was—
MR. TUERKHEIMER [United States Attorney]: Your Honor, I move to strike that portion of the answer which was "That was my honest belief."
MR. DAN LINEHAN: I object to that motion.
MR. TUERKHEIMER: I think that's what the jury can decide, not for the witness.
THE COURT: The motion is granted and the jury should disregard the witness's statement about that. That is a decision for the jury to make.

. . . .

BY MR. DAN LINEHAN: Q. Alec, when you testified before the Grand Jury did you believe that you had flown to Reno in 1978 in September with Cira Gasbarri?
A. I believed I went alone.

(Tr. 12/11/80 pp. 16-18)

Raineri's testimony that he believed his statement to the grand jury when he made it was allowed to stand. We reject the defendant's argument that by striking the redundant characterization of his belief as "honest" the court unduly prejudiced the presentation of his defense.

D. Post-Summation Comment

Defense counsel's summation included an extensive argument on the credibility of numerous prosecution witnesses. Yvonne Spears was the subject of an especially emphatic commentary, parts of which follow:

> "July and August, Gross and Spears. And Gross again testified, no prostitution. Spears testified that there was prostitution. She told the FBI when they took the stand it was out of context that she was the only girl involved in prostitution. But she had a key to the upstairs. She was doing it on her own. Today she says there was more. There's been no immunity granted to Miss Spears. I venture to say that she was the only witness who came without a subpoena. She testified to that fact. Why? Use your common sense. The letters are in evidence. Read them. Read them when you get to the jury room. Immunity or a letter of intent of immunity from Iron County from the District Attorney. Correspondence between Mr. Tuerkheimer [the United States Attorney] and the people in Milwaukee where she was in on five counts of sale of heroin.
>
> "She talked to Mr. Burg [an FBI Special Agent]. $25,000 cash bond. Couldn't make that. Apparently she wasn't making that much money either selling heroin or as a prostitute in Milwaukee. But she knows how to get what she wants. She's for sale and that lady knows it. She talks to Mr. Burg. Her bond is dropped to signature bond. Four counts are dropped and she pled to one count of sale of heroin. She's on the streets.
>
> "Hasn't been sentenced yet; keep that open until after she testifies here. I think her testimony is sickening. I think it's incredible, totally incredible. If I had the power of the Government to move people['s] lives in that manner and to work in conjunction with other law enforcement, even to give a recommendation that could help, I think I could probably bring 20 or 30 heroin dealers and prostitutes from Milwaukee before you and say that

they had face[8] with Mr. Tuerkheimer or that Milwaukee doesn't even exist.

". . . .

"Spears comes back in, tries to take over some control because she had seen that prostitution was run wide open. And Spears is going to take advantage of anybody she can. And don't let anybody tell you any different. Interesting stipulation with Spears. You find it; it's in the evidence. The banker who notarized the fact that she wasn't in prostitution, who wasn't her best trick. There is a stipulation signed between me and Mr. Tuerkheimer representing the United States Government that if that banker were to testify that he would testify that he was never at the Show Bar, that he was never a date of Yvonne Spears and anything to the contrary is untruthful in his opinion.

"Do you think for one minute the Government is going to give me that in this case if it weren't true? They know it. They're covering for their witnesses now. They come on strong and now they're covering."

(Tr. 12/16/80 pp. 950-955)

After defense counsel concluded the judge said:

"Thank you, Mr. Linehan [defense counsel]. I believe it is necessary to advise the jury, however, that they should disregard any implication by Mr. Linehan in his closing argument implying that the Government arranged or procured untruthful testimony by Yvonne Spears. Whether or not Yvonne Spears is credible or not is entirely up to you to determine and nothing that I say is intended to affect your determination of that. But it is not proper for a lawyer to imply that another side has procured untruthful testimony."

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[8] The prosecution suggests that the word "face" is an error in the transcript and that defense counsel actually used the word "sex."

Thereafter defense counsel moved for a mistrial on the grounds that the judge's remark was not a fair comment on his argument. Alternatively, defense counsel requested the court to retract its comment or to instruct the jury to disregard it. The court denied all these requests.

The court's comment did not encourage the jury to disregard defense counsel's argument that Spears testified falsely. The full context demonstrates that the court told the jury to disregard only the possible implication that the prosecution knowingly procured untruthful testimony. The words used by defense counsel could be interpreted as a suggestion that the prosecution purchased untruthful testimony. The judge personally observed the argument. In the circumstances, we find no reversible error in the comment.

III

SUFFICIENCY OF THE EVIDENCE

A. Travel Act Violations

The defendant contests the sufficiency of the evidence which supports his convictions for the violations of the Travel Act, 18 U.S.C. § 1952, charged in the first three counts of the indictment. The Travel Act provides:

> "(a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce, including the mail, with intent to . . .
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> "and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> "(b) As used in this section 'unlawful activity' means (1) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed. . . ."

To convict the defendant for violating this statute in the manner charged in the indictment the prosecution had to prove that the defendant (1) with intent to promote a business enterprise involving illegal prostitution, (2) caused[9] someone to travel in interstate commerce or use an interstate facility, and (3) the defendant thereafter promoted or attempted to promote the business enterprise. *United States v. Stevens*, 612 F.2d 1226, 1231 (10th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *United States v. McPartlin*, 595 F.2d 1321, 1361 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. Craig*, 573 F.2d 455, 489 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). *See United States v. Hedge*, 462 F.2d 220, 223 (5th Cir. 1972).

The defendant virtually concedes the sufficiency of the evidence which demonstrated his intent to promote prostitution at the Showbar and his promotion of prostitution there. To whatever extent he challenges the sufficiency of that evidence his challenge is meritless. The defendant raises three points which warrant discussion: that the use of the facilities in interstate commerce (1) was unconnected to him; (2) was unconnected to the prostitution enterprise; and (3) constituted, at most, a happenstance. The defendant's first two arguments seem to question whether, when viewed in the light most favorable to the prosecution, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the evidence would enable a reasonable juror to conclude beyond a reasonable doubt that the defendant's intentional promotion of a prostitution enterprise caused the three proven uses of facilities in interstate commerce. The defendant's third argument

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[9] Although 18 U.S.C. § 1952 only expressly applies to one who travels in or uses any facility in interstate or foreign commerce, 18 U.S.C. § 2(b) allows indictment and conviction for causing such travel or use. *United States v. Peskin*, 527 F.2d 71, 76 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). Under the Travel Act, each act of interstate travel and each interstate use may constitute a separate offense. *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir.), *cert. denied*, 449 U.S. 843 (1980); *United States v. Polizzi*, 500 F.2d 856, 898 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

questions whether Congress extended federal criminal jurisdiction to the defendant's activities.

1. Showbar Prostitution

During the period when the defendant promoted prostitution at the Showbar, dancers employed by the bar would go to booths in the bar and masturbate those customers who spent thirty-five or fifty dollars for a three dollar bottle of champagne.[10] During the same period, the dancer/prostitutes would make arrangements in the bar for the sale of their sexual favors to customers of the bar. Prostitutes would either put a share of their receipts into a box in the ladies' dressing room or give it to the bartender. Above the bar there were about twenty rooms with beds used for prostitution. The rooms were supplied with sheets, pillowcases, and electricity. This evidence demonstrated that illegal prostitution permeated the Showbar.

2. The Defendant's Involvement

In 1976, at the defendant's request Cira Gasbarri returned from California to reopen the Showbar, which her husband had operated as a prostitution enterprise before his death in November, 1975. From late 1976 until early 1979, the defendant managed the Showbar in conjunction with Gasbarri. He gave her fifty dollars for every night she worked at the Showbar. At his urging Gasbarri permitted prostitution in the Showbar. After she had once removed prostitution related booths from the bar, the defendant told her to put them back and let the girls mingle with the customers or the Showbar would not survive. Throughout this period, the defen-

[10] Effective June 1, 1978, Wisconsin defined the offense of prostitution to include intentionally masturbating a person for any thing of value. Wis. Stat. § 944.30(4); *City of Madison v. Schultz*, 98 Wis.2d 188, 197 (Ct. App. 1980). Although some of the testimony on this point concerned a period before the change in the statute, there was similar testimony covering a period thereafter.

dant and Gasbarri collected, and the defendant usually retained, the proceeds from this prostitution. He prepared Showbar checks for Gasbarri's signature, recorded information on check stubs and deposit slips, helped her with payroll problems, participated in hiring and firing employees, recruited a bartender, chose Jim Vitich to run the enterprise during his trip to Reno with Gasbarri, worked with her whenever problems arose, dealt with the bar's accountant regularly, and counted the bar and prostitution proceeds. At his request, various dummy officers signed liquor license forms. In June, 1978, when Patricia Colossaco told him about the prostitution, the defendant replied that she had nothing to worry about. When Wisconsin Alcohol and Tobacco Enforcement Division agents made a routine inspection of the Showbar, in March, 1979, he spoke to them over the phone, represented himself as the janitor, yelled at them, harrassed them, and told them they would not get very far with any prosecution in the county. The defendant had served as Circuit Judge for Iron County,[11] Wisconsin, since January 1, 1978. The defendant's statements to the state agents permitted the jury to infer that he would have used his official position to protect his prostitution enterprise.

This evidence sufficed to allow a reasonable juror to find that the defendant caused prostitution to permeate the Showbar and rendered the Showbar an instrumentality of a prostitution enterprise. Therefore the jury could reasonably conclude that the defendant caused[12]

[11] Iron County includes Hurley.

[12] Convictions under 18 U.S.C. § 1952 do not require that the defendant knowingly cause or reasonably foresee interstate travel or use of an interstate facility. *United States v. McPartlin*, 595 F.2d 1321, 1361 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. Craig*, 573 F.2d 455, 489, (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *United States v. Peskin*, 527 F.2d at 78.

Because the Travel Act counts did not require proof that the defendant knew of the use of an interstate facility, the trial court correctly rejected his request to instruct the jury that knowledge of such use was required.

(Footnote continued on following page)

whatever use the Showbar made of facilities in interstate commerce to further prostitution. *United States v. Inciso*, 292 F.2d 374, 378 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961); *United States v. Levine*, 457 F.2d 1186, 1188 (10th Cir. 1972).

3. The Interstate Elements

The benefit sought or gained from the interstate travel or use need not be essential to the illegal activity. *United States v. McLeod*, 493 F.2d 1186, 1189 (7th Cir. 1974); *United States v. Miller*, 379 F.2d 483, 486 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967). It need only hold the promise of facilitating that activity. *United States v. Craig*, 573 F.2d at 467, 489 (unsuccessful effort to obtain help in collecting money to pay bribes); *United States v. Hedge*, 462 F.2d 220 (5th Cir. 1972) (shipment never picked up).

With respect to Count I, the prosecution proved the use of a facility in interstate commerce by showing that a payroll check drawn August 12, 1978 on the Showbar's Michigan bank account[13] was given, in Hurley, Wisconsin, to Yvonne Spears, a dancer and prostitute at the Showbar, as compensation for her nude dancing, and crossed the state line in the process of collection. Gas-

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[12] *continued*

The Sixth Circuit rejects the majority position and holds that a defendant must have actual knowledge of the interstate activity. *United States v. Alsobrook*, 620 F.2d 139. We continue to adhere to the majority position because we believe that an implied scienter requirement would severely undermine the Travel Act's purpose: to assist local authorities in combating criminal activities that extend beyond the borders of one state. *United States v. Peskin*, 527 F.2d at 78. We note that the reach of the Travel Act extends beyond organized criminal activity occurring in one state but managed from another. *Erlenbaugh v. United States*, 409 U.S. 239, 247 n.21 (1972); *United States v. Archer*, 486 F.2d 670, 678-80 (2d Cir. 1973).

[13] The Showbar maintained the account in question under the name Ritz Bar, Inc.

barri signed the check. A reasonable juror could have found that the payment to a prostitute for nude dancing facilitated prostitution at the Showbar.

Count II was based upon a September 12, 1978, check drawn on the Showbar's Michigan bank account and used in Wisconsin to pay the Lake Superior Power Company, a Wisconsin business, for power at the Showbar. The defendant prepared this check for Gasbarri's signature. The check crossed state lines as part of the regular clearance process. Among other things, electricity was used to light the barroom and the upstairs rooms, to chill the champagne, and to provide musical accompaniment for the dancer/prostitutes. Thus a reasonable juror could have found that the payment facilitated prostitution.

The delivery of sheets and pillowcases from Hibbing, Minnesota, to the Showbar on October 2, 1978, formed the basis for Count III. Two prostitutes testified that they found sheets and pillowcases on the beds where they worked upstairs. Thus the jury also could have concluded that the interstate delivery of the linen facilitated prostitution.

In a Travel Act prosecution the interstate travel or use must relate significantly, rather than incidentally or minimally, to the illegal activity. *United States v. Craig*, 573 F.2d at 489. Proof that the defendant, without detriment to the illegal enterprise, could have replaced the interstate travel or use with an intrastate activity does not suffice by itself to prove the insignificance of the interstate element. We test the sufficiency of the jurisdictional basis (the interstate element), not by black-letter rules but by "the nature and degree of interstate activity in furtherance of the state crime." *United States v. Rauhoff*, 525 F.2d 1170, 1174 (7th Cir. 1975) *quoting United States v. Isaacs*, 493 F.2d 1124, 1148 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

The jury could readily find that the maintenance and regular use of a bank account and the use of a linen supply house were significant in facilitating the illegal enterprise. Whatever the reason for the choice of bank

or linen supply house, transactions with the ones chosen involved travel or use of a facility in interstate commerce. It was unnecessary to identify some particular advantage derived out of the location of the bank account in Michigan or the linen supply house in Minnesota.

The case before us is not one where violation of the Travel Act was predicated upon fortuitous or isolated and insignificant interstate involvement, merely because a victim cashed a check before paying an extortioner, *compare, United States v. Altobella*, 442 F.2d 310, 315 (7th Cir 1971), or because of the fortuitous organization of the Federal Reserve System, *compare, United States v. Isaacs*, 493 F.2d 1148, or because of the geographical origin of customers, *compare, Rewis v. United States*, 401 U.S. 808 (1971). In the case before us "the nature and degree of interstate activity in furtherance of the state crime" provides a sufficient basis for the exercise of federal jurisdiction. *United States v. Rauhoff*, 525 F.2d at 1174.

B. False Declarations

The defendant contends that his false statements before the grand jury were not material to its investigation. The materiality of a false statement is an essential element of the crime and is a question of law for the court to decide. *United States v. Picketts*, 655 F.2d 837, 840 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3402 (Nov. 16, 1981). *See Sinclair v. United States*, 279 U.S. 263, 298 (1929). We have defined materiality as a statement's "effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation." *Picketts*, 655 F.2d at 839; *United States v. Parker*, 244 F.2d 943, 950-951 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957). *See United States v. Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976) (anything that could influence or mislead); *United States v. Percell*, 526 F.2d 189, 190 (9th Cir. 1975) (relevant to any subsidiary issue under consideration); *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973) (tending to influence, mislead, or hamper). Potential interference with a line of inquiry suffices to establish

materiality, regardless of whether the perjured testimony actually serves to impede the investigation. *United States v. Howard*, 560 F.2d 281, 284 (7th Cir. 1977).

In March, 1980, before the grand jury, the defendant stated: that he and his wife were like brother and sister to Gasbarri and her husband; that after the death of Gasbarri's husband, the defendant's relationship with Gasbarri remained the same, that the defendant and Gasbarri did not have an affair and did not travel together alone except for one time when he took her to the hospital in Duluth, and once or twice when he took her to Milwaukee to shop when he was driving there to sit in criminal court. When asked before the grand jury about a trip he took in September and October, 1978, to a judicial seminar in Reno, Nevada, the defendant said that he did not travel to and from Reno with Gasbarri; that she came there with her brother and sister; that either they looked him up or he ran into her sister by accident; and that he probably spent one day with Gasbarri in Reno. In fact, the defendant traveled to and from Reno with Gasbarri and they stayed together for the three weeks except for three or four days. He paid for her travel expenses.

The relationship between the defendant, a Circuit Judge and former District Attorney, and Gasbarri, the person ostensibly in charge of the Showbar, was important to the grand jury's investigation into the defendant's involvement in the prostitution enterprise. The defendant's false statements had the tendency to impede the grand jury from discovering the nature and the depth of that relationship. Therefore they were material.

C. Obstructing Justice

The defendant asserts that the record contains insufficient evidence to show that he knew that Patricia Colossaco, the person he arranged to have threatened, would be a witness before the grand jury. The defendant knew about the pending grand jury investigation. He had testified before the grand jury, at which time the

United States Attorney had told him that he was a target of the investigation, and had asked him whether Colossaco had ever told him there was prostitution at the Showbar. The defendant answered the question negatively. From these facts the jury could reasonably infer that, on the very next day, when the defendant endeavored to silence Colossaco, he knew that Colossaco was going to be a witness before the grand jury. *Odom v. United States*, 116 F.2d 996, 999 (5th Cir.), *rev'd on other grounds*, 313 U.S. 544 (1941).

In light of our conclusions that the trial judge did not err in her various rulings and that the evidence supports the convictions, the judgment is AFFIRMED.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 81-1394

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALEX J. RAINERI,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin,
the Honorable Barbara J. Crabb, Presiding

PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING IN BANC

LINEHAN LAW OFFICES

Daniel W. Linehan
Attorney for Defendant-
Appellant
105 West Doty Street
Madison, WI 53703
(608) 257-0625

SUGGESTION FOR REHEARTNG IN BANC

Petitioner respectfully suggests that this petition be heard in banc. The basis for this suggestion is as follows:

1. If the Court's decision on location of trial and jury selection is allowed to stand, three-fifths of the jurors (on a geographical basis) in the Western district of the State of Wisconsin will never see service on a petit jury, and there will be no future jury trials in three of the five divisions of the Western District of Wisconsin since the United States Government has seen fit to close down the Courthouse facilities in those divisions.

2. The Court's decision represents a substantial expansion of the Travel Act, considering the incidental, minimal and happen-

stance nature of the interstate activity in this case. Allowing the Court's decision to stand would indicate that individuals who happen to live within several blocks of a State boundary, and use economic institutions on either side of that State boundary, can be hauled into Federal Court and required to answer under The Travel Act, while individuals who engage in the identical behavior in the middle of a state could not be hauled into Federal Court to answer for their behavior. Appellant respectfully represents that the fortuitous location of Cira Gasbarri's business (being within several blocks of the Wisconsin-Michigan state line) was the principal basis for the acquisition of federal jurisdiction in this action.

3. This Court's decision in United States vs. McPartlin, 595 F. 2d 1321 should be reversed

to the extent that a defendant should be required to have actual knowledge of interstate activity before he may be prosecuted under the Travel Act. This should be particularly true when the interstate connection is based upon the fortuitous and happenstance location of a state boundary, rather than a design to frustrate local law enforcement.

I

PETITION FOR REHEARING

A. Location of Trial and Selection of Jury

The Court's decision in this case referred to a variety of "facts" which Appellant respectfully represents are not properly in the record. On page 3 of the Court's decision there was reference to "the volume of cases", "limited personnel", "facilities", and "other resources", "increased centralization of judicial activity" and other reasons to justify holding this trial in Madison. Footnote four (4) referred to these as "legitimate factors" and distinguished it in that regard from several cases which we believe should have led to a reversal of this case.

The above-referred to "facts" in the opinion of Appellant are not "facts because they are not in the record and are not factual

in nature.

Furthermore, and even more importantly, the record demonstrates that there was a federal courtroom available in Superior, which the trial court refused to use.

Appellant's issues with regard to jury selection and location of trial are inextricably interwined. This Court ruled that Appellant did not properly preserve the issue of jury selection because Appellant did not comply with the text of Section 1867(d), which is quoted in Footnote #5. Appellant respectfully represents he did comply with that since had the Court determined that Superior was a proper location for trial, the petit jury would have been picked from that division under the juror selection plan for the Western Division of Wisconsin. This Court further stated on page five (5) of its decision that

defendant's motion to change the place of trial would not have remedied the situation. Had trial been held in Superior, each and every juror would have been from the Superior division under the Western Division's Plan.

Both the allusion to Section 1867(d) and the argument relating to lack of judicial facilities were raised for the first time on appeal, and were further raised by the Court of Appeals rather than the government or the Appellant. Furthermore, if the Court determined that the failure to draw excess of five years (petit jurors) was improper, it was the Court that was supposed to stay the proceedings pursuant to Section 1867(d).

It is apparent from the entire record that the refusal to try this case in Superior led directly to the result of having a petit jury without a single juror from the division

in which the defendant resided, the crimes were allegedly committed, and the vast majority of the witnesses were called from. It was apparent that the trial in Madison was most convenient only to the Court, with the possible exception of being more convenient for the United States Attorney's office. Appellant's request for a trial in Superior was the practical equivalent of a request for a stay, since such a trial could not have been conducted until jurors from the Superior Division had been selected, remedying Appellant's objection to the Plan for selection of jurors for the Western District.

In summary, the motion relating to location of trial and jury selection were inextricably interwined and had the motion for location of trial in Superior been granted, the problem with the Plan for selection of

jurors would have been remedied. Also Section 1867(d) (emphasis added) provides that the Court shall stay the proceedings if the Court determines that there has been a failure to comply with the provisions of Section 1867(d) (emphasis added).

B. Appellant's Right to a Speedy Trial Was Denied.

This Court's finding that the cancellation of the trial date was entirely understandable is essentially speculation, in the respectful opinion of Appellant. The Magistrate's June 23rd pretrial order specifically stated that the trial date would not adjourned without a finding on the record regarding the reasons for adjournment. This order was entered after the defendant had requested an adjournment and that request had been denied. For reasons which are contained nowhere in

the record, the trial date was adjourned by way of a one-paragraphed letter from the Clerk of Court. It would be as easy to speculate that it was adjourned for the convenience of the government as it is to speculate that it was adjourned because of motions. Appellant's right to a speedy trial was denied because the adjournment of the trial violated the order of the Magistrate on its face.

The June 23rd order of the Magistrate may be based upon the speedy trial statute, but that does not change the fact that both the Magistrate's order and statute require findings on the record for an adjournment such as the adjournment of Appellant's August 29th trial date.

C. The Medical Records in Question Should Have Been Admitted into Evidence.

The record in this action reflects the fact that the defense had hired their own

psychiatrist, Dr. Leigh Roberts, and that the medical records in question had been turned over to him prior to the time the Court discovered its "error" having allowed defense counsel to look at the records.

The trial court's refusal to grant a psychiatric examination, together with its refusal to even consider the issue of privilege with regard to the medical records effectively precluded defense counsel from making any showing as to the witness' (Cira Gasbarri) mental competence and state of mind at the time she testified, as well as preventing the defense from fully exploring her state of mind at the time the events in question occurred.

The trial court refused to consider the issue of privilege and refused to even consider the issue of admissibility of the records

in quesiton, based on defense counsel's alleged failure to bring the issue before the Court in a timely fashion.

Interestingly enough, however, when the issue was brought before the Court (by way of the testimony of Dr. Paz) the Court ruled within a period of five or ten minutes that Dr. Paz' testimony was not privileged. This ruling applied equally well to the medical records.

This court pointed out (page 4) that defense counsel did not ask Dr. Paz any questions about the medical records. Further, the Court comments that the records were not offered again. The trial court made it abundantly explicit that the trial court did not want to hear any more about the medical records in question and would not consider their admissibility again. This was made clear

more than once in the record of the trial prior to the testimony of Dr. Paz.

The medical records were clearly not privileged, as Dr. Paz' testimony showed within a matter of minutes. There would have been no delay in the trial had this issue been addressed at the time defense counsel asked for permission to argue the admissibility of the records. Considering the type of facts that the record indicates were in these medical records, the failure to even allow argument about their admissibility was clearly prejudicial. The introduction into evidence of those records, <u>together with the ability for the defense expert to analyze these records</u>, and then offer testimony of his own, if relevant, clearly was critical to the approach the defense chose in the trial.

In short, there was more delay arguing over the court's refusal to consider the issue of privilege and admissibility than there would have been in actually deciding the issue, and this is clearly demonstrated during the testimony of Dr. Paz. The medical records were necessary to an adequate defense, and nullified any use defense counsel was able to make of his expert witness (Dr. Leigh Roberts). Even this Court stated that "the record may have added little or nothing to the extensive onslaught" (emphasis added), (page 15, this Court's opinion).

D. Gasbarri's Subpoena.

The subpoena on Cira Gasbarri should not have been quashed. It is apparent on its face that in a trial of this length there will easily be factual questions to ask a witness at the end of the trial, which could not

possibly or reasonably be asked of the same witness at the beginning of the trial. This Court based part of its ruling on Gasbarri's subpoena on what it termed "prejudicial over-emphasis" on Gasbarri's credibility. The Appellant respectfully represents that there was prejudicial under-emphasis on Gasbarri's credibility by allowing the government to call her as a first witness in a trial of this length, and refusing defense counsel the right to call her as a witness at all.

Among other items which Cira Gasbarri could have been questioned about would have been the contents of the medical records, and this would have constituted questioning based upon issues other than impeachment. This and other issues which Appellant believes were brought to the attention of the trial court, and this subpeona was still quashed.

It is certainly not undue harassment of Cira Gasbarri to be asked to testify on the behalf of the defense, with all expenses paid, when she has been able to find the time to do the same at least twice for the government (trial and grand jury).

Furthermore, even this Court's decision admits that their ruling supporting the ability of the Court to quash Cira Gasbarri's subpoena puts defense counsel in a place of having to explore every possible area of cross-examination during the government's case in chief, which could result in defeating a motion for a directed verdict of acquittal. This Court also concedes that defense counsel may be unaware of things which become known later in the trial during the cross-examination of the prosecution's initial witness. This is even more glaringly true in the trial of this length.

E. The Word "Honest" Should Not Have Been Stricken from the Defendant's Direct Examination.

This Court ruled that the trial court's striking of the work "honest" from the defendant's testimony did not unduly testify regarding his belief, even if he was not allowed to testify that his belief was "honest".

While there may be some abstract merit to this Court's characterization of the word "honest" as being redundant to the word "belief", the effect of having the work "honest stricken from the defendant's testimony in front of the jury when the defendant is charged with perjury is so devastating to the defendant's testimony and plainly indicates on its face a belief by the Court that the defendant is not "honest".

The issue of this trial, or at least the

principal issue, was credibility, and the Court's upholding of the government's motion to strike the work "honest" from the defendant's own testimony was completely prejudicial and should result in a reversal.

F. This Decision by the Court of Appeals Represents a Significant Expansion of the Travel Act.

The Court of Appeals obviously made a completely extensive review of the record in rendering its opinion in this matter. With that in mind, this Court is certainly aware that the interstate elements in the prosecution of this action were intimately connected with the fortuitous location of Cira Gasbarri's bar, being extremely close to the boundaries between Wisconsin and Michigan.

Furthermore, it is not reasonable to conclude that a reasonable juror could have

believed that the defendant "caused" whatever use the Showbar made their facilities in interstate commerce. There is absolutely no connection between Appellant and the laundry. A decision to bank in Michigan was Cira Gasbarri's, and that bank was so close to her bar that is is simple coincidence that the bank in question was in another state.

While the benefit from the interstate travel may not be essential to the illegal activity, it is equally true that under the Travel Act the use of the interstate travel should be part of the design to frustrate local law enforcement, or at least be part of a factual circumstance which does frustrate local law enforcement. That is clearly not the case since the selection of interstate institutions or business was fortuitous and happenstance, and the record demonstrates

this. Furthermore, while the benefit from the interstate activity may not be essential to the illegal activity, this Court's own opinion (page 26) recognizes that the interstate activity must relate significantly to the illegal activity. It is clear that all interstate activity in this factual situation was completely coincidental, and did not relate in any significant fashion to the illegal activity.

Applying this Court's interpretation of the Travel Act, individuals such as Cira Gasbarri who operate bars on or near interstate boundaries can be hauled into Federal Court to answer for the occurances in those bars even if local law enforcement is not frustrated. An identical individual and bar located further from state line would be hauled into Federal Court. The Travel Act

is not designed to have any firmer application near a state boundary than far away from a state boundary, provided that the location of an enterprise near a state boundary is not meant to frustrate local law enforcement and does not in fact result in the frustration of local law enforcement.

In summary, this Court's opinion represents an expansion of the Travel Act, but it is necessary to review the fortuitous circumstances involved in the use of interstate facilities before it becomes apparent that the decision was in fact an expansion of the Travel Act. Also, in a variety of other cases, such as United States vs. Altobella, 442 F. 2d 310, 315 (7th Circuit 1971), and United States vs. Isaacs, 493 F. 2d 1148, the money or check involved

were intimately connected with a criminal enterprise, while that is not the case in this instance.

G. The Record Does Not Support a Conviction on Obstructing Justice.

Appellant respectfully repeats his earlier representation that the record does not contain any facts to support a jury's finding that Appellant was aware that Patricia Colossaco was to be a witness before the grand jury. Furthermore, Ms. Colossaco herself testified that she was not frightened by the alleged threat in question

Respectfully submitted,

LINEHAN LAW OFFICES OF
Madison

/s/ Daniel W. Linehan
Daniel W. Linehan
Attorney for Defendant-Appellant
105 West Doty Street
Madison, WI 53703
608/257-0625

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

MARCH 24, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 81-1394 vs.

ALEX J. RAINERI,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin No. 80 CR 29
BARBARA J. CRABB, Judge.

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing *in banc*, filed by counsel for the defendant-appellant in the above entitled cause, all members of the original panel having voted to DENY a rehearing, and no member in regular active service having requested a vote on the *in banc* suggestion, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

The mandate of this Court issued March 9, 1982. On March 10, 1982 we entered an order permitting defendant to file his petition for rehearing instanter. Under the circumstances it would have been propriate to recall the mandate pending consideration of the petition for rehearing, and the mandate would have been stayed pursuant to Rule 41(a), F.R. A.P.

The petition for rehearing now having been considered and DENIED,

IT IS ORDERED that the mandate be deemed to have been recalled. It will again issue seven (7) days after the date of the order, unless further stayed. Under the circumstances, the record now in the district court need not be physically returned to this Court.

NO. 81-1394

On March 22, 1982 defendant filed a motion for continued stay of execution of sentence. The purpose of the motion will be accomplished by the recall of mandate herein ordered, and the motion is therefore, DENIED.

PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

April 23, 1979

1. Policy.

It is the policy of this Court to give effect to the statutory directives contained in 28 U.S.C. SS1861-62: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair crosssection of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that pur-

pose. No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

2. Applicability of plan.

The Western District of Wisconsin is hereby divided into divisions for jury selection purposes, pursuant to 28 U.S.C. S1869(e), as follows:

Eau Claire Division, consisting of the counties of Chippewa, Clark, Dunn, Eau Claire, Pepin, Pierce, St. Croix, and Taylor;

La Crosse Division, consisting of the counties of Buffalo, Crawford, Grant, Jackson, La Crosse, Monroe, Richland, Trempealeau, and Vernon;

Madison Division, consisting of the counties of Columbia, Dane, Green, Iowa, Jefferson, Lafayette, Rock, and Sauk;

Superior Division, consisting of the counties of Ashland, Barron, Bayfield, Burnett, Douglas, Iron, Polk, Price, Rusk, Sawyer, and Washburn;

Wausau Division, consisting of the counties of Adams, Juneau, Lincoln, Marathon, Oneida, Portage, Vilas, and Wood.

The provisions of this plan apply to all the divisions in this district.

3. Management and supervision of jury selection process.

The clerk of court shall manage the jury selection process. The clerk shall act under the supervision and control the chief judge of this district.

4. Source of names of prospective jurors.

The names of prospective jurors shall be selected from the official lists of actual voters of the political subdivisions within the relevant division in the most recent federal general election held in the fall of even numbered years. New source lists shall be obtained every two years as soon as possible after the federal general election held in the fall of even numbered years. Copies of official voter lists shall be obtained from the county clerk of each county in this district, or made by copying official voter lists furnished by county clerks. The court finds that it is not necessary in this district to prescribe some other source or sources of names in addition to official lists of persons actually voting in order to foster the policy

and protect the rights secured by 28 U.S.C. SS1861-62.

5. Procedure for selecting names of prospective jurors from source lists.

For each division the following procedure shall be used for selecting names of prospective jurors from source lists. Determine a quotient number, n, by dividing the total number of names on the lists for that division by the number of names desired to be selected. Drop any fraction which might result from this division. Then determine a starting number by placing in a wheel discs of the same size numbered from 1 to n, and picking one numbered disc at random from the wheel. Arrange the source lists alphabetically by county, and, within each county, towns arranged alphabetically followed by cities arranged alphabetically. From the

first list select the name corresponding to the starting number, and then select every nth name that appears. Do not interpret this selection of every nth name when passing from one political subdivision's list to another's, but make the selections as if there were one continuous list of names for the entire division. Each name selected shall be clearly indicated on the source list and numbered consecutively starting with number one.

6. Master Jury Wheels.

The clerk shall maintain a master jury wheel for each of the divisions within the district. The master jury wheel shall be filled with discs of the same size numbered to correspond with the numbers assigned to each name selected from the source lists for that division. The minimum number of

discs to be placed initially in each master jury wheel shall be one thousand. The court finds that it would be unnecessary and cumbersome to require that a larger number of discs be placed initially in any master jury wheel. The chief judge of this district may order additional names to be placed in any master jury wheel from time to time as necessary. Each master jury wheel shall be emptied and refilled every two years as soon as completed source lists are obtained from all the counties in the relevant division.

7. Withdrawal of discs from master jury wheel.

From time to time as directed by the chief judge of this district, the clerk shall publicly draw at random from the master jury wheel for each division discs corresponding to the names of as many persons as may be required for jury service. The clerk

shall prepare an alphabetical list of the names so determined. This list shall be typed on sheets of perforated gummed mailing labels, and a copy of this list retained as a record of prospective jurors. This list shall not be disclosed to any person except pursuant to 28 U.S.C. SS 1867-68, or upon the direction of the chief judge of this district.

8. Completion of juror qualification forms.

The clerk shall mail to every person whose name is determined pursuant to section 7 of this plan a juror qualification form which has been prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States. The form shall be accompanied by a postage-paid return envelope and by a letter instructing the prospective juror to

fill out and return the form, duly signed and sworn, to the clerk by mail within ten days. The letter of instruction shall include a list of those groups or classes whose members shall be excused upon individual request according to this plan.

9. Persons not qualified for jury service.

All prospective jurors shall be deemed qualified to serve on grand and petit juries in this district unless

(a) He is not a citizen of the United States, eighteen years old, who has resided for a period of one year within the judicial district;

(b) He is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(c) He is unable to speak the English language;

(d) He is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(e) He has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

10. Exemption from jury service.

The court finds that exemption from jury service of the following groups of persons or occupational classes is in the public interest and would not be inconsistant with 28 U.S.C. SS 1861-62, and therefore members of the following groups or classes shall be barred from jury service on the ground that they are exempt:

(a) Members in active service in the armed forces of the United States;

(b) Members of the fire or police departments of any state, district, territory, possession, or subdivision thereof;

(c) Public officers in the executive, legislative, or judicial branches of the government of the United States, or any state, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties. "Public officer" shall mean a person who is either elected to public office of who is directly appointed by a person elected to public office.

11. Excuses on individual request.

The court finds that jury service by the following groups of persons or occupational classes would entail undue hardship or extreme inconvenience to the members thereof, and that the excuse of members thereof would not be inconsistent with 28 U.S.C. Sections 1861-62. Therefore, members of the following groups or classes shall, on individual request therefore, be excused from jury service:

(a) All persons over 70 years of age;

(b) Actively engaged members of the clergy and actively engaged members of religious orders;

(c) Any person responsible for the active day to day supervision of a child or children under the age of 10 years;

(d) Actively practicing attorneys, physicians, dentists, and registered or practical nurses;

(e) Actively engaged school teachers;

(f) Sole proprietors of businesses;

(g) Persons who have served as a grand or petit juror in a state or federal court within the preceding two years;

12. Determination of qualifications, exemptions, and excuses.

The chief judge, on his initiative or upon the recommendation of the clerk, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names determined by drawing discs from the master jury wheel.

13. Qualified jury wheels.

The clerk shall maintain separate qualified jury wheels for each division in the district, and

shall place in such wheels all the discs which were drawn from the appropriate master jury wheel and which correspond to the names of persons who are not disqualified, exempt, or excused from petit jury service pursuant to this plan. From time to time the clerk shall publicly draw at random from the qualified jury wheels discs corresponding to the names of as many persons as may be required for assignment to petit jury panels. The clerk shall prepare a separate list of names of persons assigned to each petit jury panel. These lists shall be disclosed to the parties as soon as practicable after a firm trial date has been established, unless otherwise directed by the chief judge or the judge assigned to try the case. At the time such a list is disclosed to the parties, it shall be made available at the clerk's office to the public upon request therefore, unless otherwise directed by the chief judge or the judge assigned to try the case. The chief judge or the

judge assigned to try any case may order such lists to be kept confidential in any case where the interests of justice so require.

Each qualified jury wheel shall be emptied every two years at the time the corresponding master jury wheel is emptied and refilled.

14. Assignment to petit jury panels.

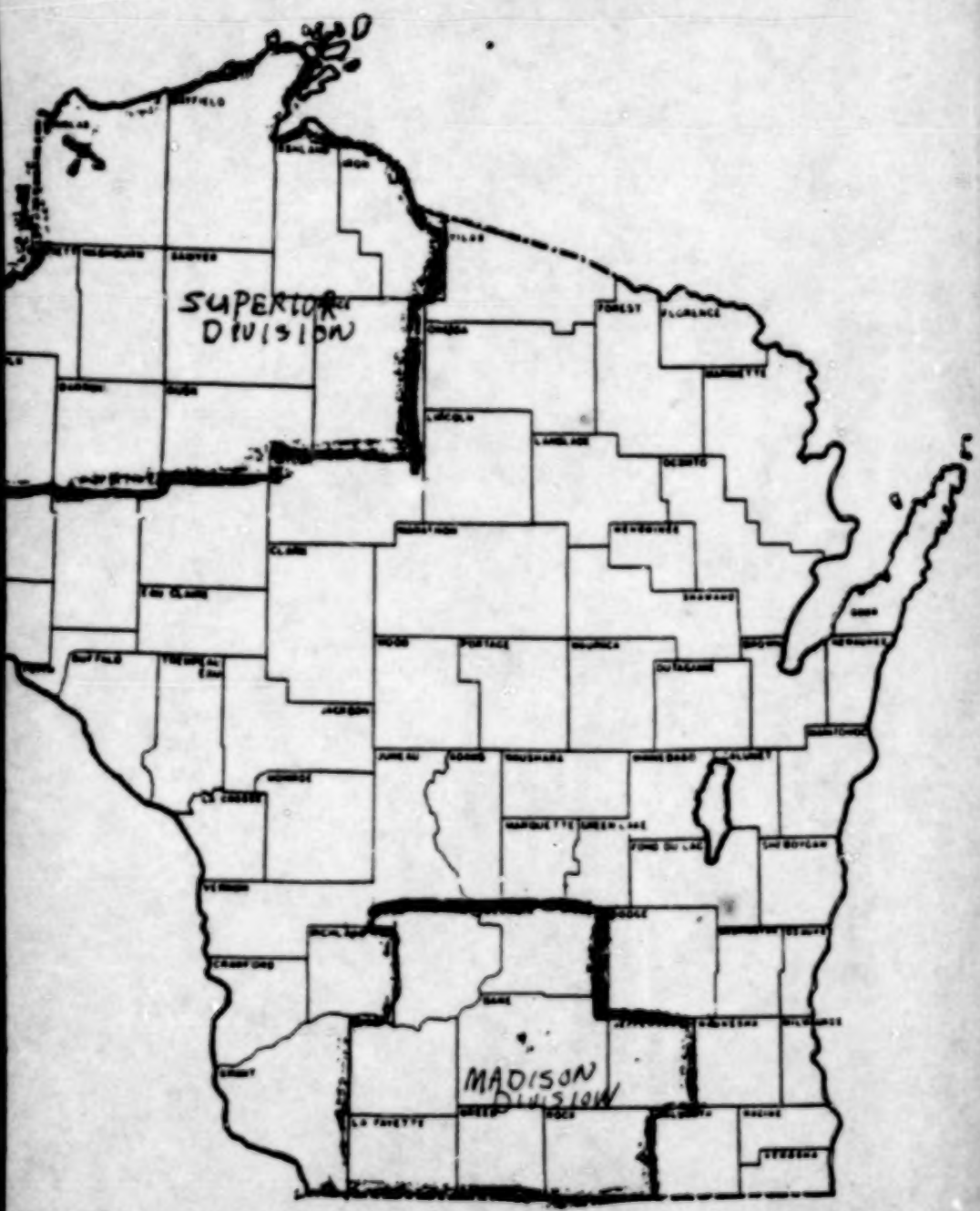
Persons whose names were selected pursuant to section 13 of this plan shall be called to appear as prospective jurors for all jury trials held in the appropriate division for a period not to exceed eighteen months. In any such period no person shall be required to complete service in a particular case. If the current panel for a division contains more persons than reasonably needed for the selection of a jury in a specific case, the clerk shall select at random the names of the number of persons he determines should be called. This selection shall be made by drawing numbered discs at random from a box or similar container.

If two or more jury trials are to commence on the same day in the same city in this district, a central jury pool shall be used. The names of the prospective jurors directed to report to any specific courtroom shall be determined at random by the clerk by drawing numbered discs from a box or similar container. Persons excluded from service in a particular case upon pereptory challenge or upon challenge by a party for good cause shown shall be returned to the central jury pool.

15. Selection of grand jury.

When the court orders that a new grand jury should be summoned, the clerk shall publicly draw at random from the qualified jury wheels of the district discs corresponding to names of as many persons as may be required for grand jury service. If inspection of the juror questionnaire of a person so selected reflects that the person should be excused from grand jury service but not from

petit jury service pursuant to section 11(h) of this plan, that person's disc shall be replaced in qualified jury wheel and another disc drawn at random. The number of discs drawn from the qualified jury wheel for each division shall be as near as possible in the proportion which the numb number of names on the current source lists for that division bears to the total number of names on the current source lists for the entire district. The clerk shall prepare a list of names of persons assigned to each grand jury panel. This list shall not be disclosed except as may be directed by the chief judge. Each grand jury shall serve for a period not to exceed eighteen months.


SUPERIOR
DIVISION
MADISON
DIVISION

P R O C E E D I N G S

JOSEPH W. SKUPNIEWITZ,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. LINEHAN:

Q Would you state your name for the record, please sir?

A Joseph W. Skupniewitz.

Q How are you employed?

A I'm the Clerk, United States District Court, Western District of Wisconsin.

Q How long have you held that position?

A Since October of 1971.

Q Do you have in your custody records that would indicate how many Grand Jurors were present on the dates on which evidence was considered in this particular action?

A Yes, I do.

Q Do you have those records with you?

A I have with me not the source records themselves but rather a worksheet that I made up from those records. I'll describe briefly the work sheet lists by code number the 23 Grand Jurors that were at various times members of this Grand Jury. And it lists each one of the dates on which the U. S. Attorney has advised me that matters concerning defendant Raineri were considered.

I have then indicated whether the Grand Juror was present or absent for each Grand Juror for each date.

Q And the record that you have in front of you, is that something that was compiled by you personally?

A Yes, sir, from the source records in my custody.

Q And to the best of your knowledge then it's accurate if compared with the source records themselves?

A Yes, sir.

Q There were 23 Grand Jurors all together, is that correct for this case?

A At any given time there were as many as 23 Grand Jurors. At one point during the chronological sequence the Grand Jury was brought up to full strength of 23. At the earlier stages, as a result of permanent excuses, there were not 23. At some point, I believe in March or April, two additional Grand Jurors were added to bring it up to full strength of 23.

Q Do your records indicate how many Grand Jurors were present on the eight dates mentioned in your affidavit recently filed on October 6th?

A Yes, they do.

Q To make it short, perhaps, were there less than sixteen Grand Jurors present on any of the eight dates mentioned in your affidavit?

A No. There were at least seventeen present on each of the dates in question.

Q And did you make any independent examination of your source records to determine whether or not those eight dates were the only dates on which Mr. Raineri's case was considered?

A I have no information or records as to what matters are considered by the Grand Jury on any given date. The information as to the identity of these dates was furnished me by the U. S. Attorney.

Q Does the record you have with you indicate how many Grand Jurors concurred in the indictment in this action?

A No, it does not. That record is available to me as a sealed document downstairs.

Q Does it indicate specifically on what dates the Foreperson was present in regard to these--I'm speaking only of these eight dates which Mr. Tuerkheimer provided you with?

MR. TUERKHEIMER: Objection, Your Honor.

THE COURT: I'm sorry. Would you restate the question.

BY MR. LINEHAN:

Q Does it indicate on which of these eight dates we have been discussing the Foreperson of this particular Grand Jury was present?

THE COURT: And what's the ground of your objection?

MR. TUERKHEIMER: That it is of no relevance when the Foreperson was or was not present. As I understand the motion, we're talking about the entire body of Grand Jurors.

THE COURT: Yes, Mr. Linehan, what's the relevance of the presence or absence of the Foreperson?

MR. LINEHAN: The only relevance would be the fact that this individual eventually signed the document.

I think I'll withdraw the question because I don't think their vote

carries any more weight than anybody else's.

THE COURT: No. I think in that respect Mr. Tuerkheimer is right. It's an irrelevant matter. Okay.

BY MR. LINEHAN:

Q Do you have a record in front of you that gives you the date on which two Grand Jurors were added to bring the Grand Jury to 23?

A Not precisely. I know the first of the eight dates that Mr. Tuerkheimer has indicated the Raineri matter was considered--the two additional Grand Jurors first appeared on April 8th. But it's possible that there was a Grand Jury meeting that did not consider Raineri prior to that time where these two people were added.

MR. LINEHAN: I guess at this point it would be the appropriate point to determine whether or not there is relevance in the legal sense to determining what issues were

determined or were testified about on which date, and who was present and who eventually voted to indict with regard to those issues.

THE COURT: Okay. Before doing that let me ask--you've made a sufficient inquiry, Mr. Linehan, or Mr. Skupniewitz as to--at least as far as you're concerned, on the question of the number of the quorum?

MR. LINEHAN: I'm satisfied that based on the testimony that there was at least seventeen on each of these eight dates that the Clerk has been provided with.

THE COURT: Okay. Let me first ask, Mr. Tuerkheimer, do you have any questions you wish to address to Mr. Skupniewitz with respect to the quorum issue?

MR. TUERKHEIMER: On the quorum issue?

THE COURT: Or any of the questions Mr. Linehan covered up to this point.

MR. TUERKHEIMER: Yeah, one or two.

CROSS EXAMINATION

BY MR. TUERKHEIMER:

Q Mr. Skupniewitz, you've eluded to eight dates--

A Yes, sir.

Q --that kind of formed the focal point of your examination of the records. Are those the eight dates which are mentioned in the affidavit which you filed with this court on October 6th, 1980?

A Yes, it is.

MR. TUERKHEIMER: All right. That's all I have.

THE COURT: Okay. I think we ought to deal now with the question of the legal relevance of further inquiry with respect to who was present at particular times.

* * *

THE COURT: Okay. Mr. Skupniewitz is still present and let me ask him, if I can, and still under oath, Mr. Skupniewitz, how difficult would it be for you to provide the

information which Mr. Linehan is requesting?

THE WITNESS: I believe this chart is the information and I can make copies in minutes. This chart indicates for each of the eight days which specific Grand Jurors were present.

MR. LINEHAN: By numbers?

THE WITNESS: By numbers. So you can follow through and see that on a particular day all 23 were present. And so that day would drop out of your consideration completely.

You would be able to take the three Grand Jurors that were not present on the last day and disregard other days on which they weren't present, they weren't present to vote either.

You could do your job from this data.

MR. LINEHAN: I would agree that I probably could. I'm not looking for names.

THE COURT: Okay. That's right, which wouldn't be revealed in any event.

* * *

THE COURT: Well, it seems to me it's a simple enough matter to take care of. We can simply have Mr. Skupniewitz retake the witness stand and Mr. Linehan can ask you about your knowledge as to the last trial in Superior. Why don't we just simply accomplish that.

Mr. Linehan.

REDIRECT EXAMINATION

BY MR. LINEHAN:

Q Mr. Skupniewitz, I believe you said this earlier, but I forgot, how long have you been the Clerk of Court here?

A Since October of '71.

Q And to the best of your recollection when was the last time that there was a

Federal criminal case for the Western District that was venued in Superior?

A That was tried in Superior?

Q That's right.

A I can be certain that there was none within the last five years. That includes the entire period of time since the facilities there were relinquished by the Federal courts back to the General Services Administration.

Going back the ten years before that, from say, '65 to '75, I do know that there were one or more criminal trials at Superior. Whether they went all the way to jury verdict or whether they settled; but they were, as you used the term "venued", they were scheduled to take place at Superior.

I can't be more precise in that ten year period, partly because of failure of memory and partly because I was not

Clerk of Court during that entire period. But I am aware of memory of a criminal case or two having been tried at Superior. I have a vague recollection that one of them was before a visiting judge, and that's about the extent of my memory on that.

Q Do part of your duties involve the sending or the supervision of sending of subpoenaes to jurors for petit jurors?

A Yes, sir.

Q During your tenure here--was it '72, did you say?

A '71.

Q Since 1971 has your office ever sent subpoenaes for petit jurors to the individuals in the Superior Division?

A I can't be positive during the period from say '71 to '75. I know we have not since that time summoned any jurors for petit jury service at Superior.

Q If you know, as the Clerk, would this mean that since '75 no jurors from the Superior Division have served on jury duty on civil or criminal cases in this District?

MR. TUERKHEIMER: That's as petit jurors?

THE WITNESS: As petit jurors, that is correct.

MR. LINEHAN:

Q Do the Grand Jurors come from the entire District?

A Yes, they do.

Q Do you know of your own knowledge when the current Jury Selection Plan was implemented in this District?

A The current Plan was implemented in approximately January of 1972 and has received two or three relatively minor revisions since, none affecting location

of trial or where jurors are summoned from.

Q Would the information or records in your office indicate whether or not jurors from the Superior Division have ever received subpoenaes, if that's the proper word, for petit juror service since '72?

A Juror records are presently retained for approximately five years. So going back into the period of time prior to '75 there might not be records unrelated to specific cases. And it would be a task of memory of people that have been around the court to try and remember specific cases that were tried at Superior, obtain those files and then verify that in fact petit jurors were present for those cases.

MR. LINEHAN: That's all the questions that I have.

THE COURT: Mr. Tuerkheimer, do you have any questions?

MR. TUERKHEIMER: I just have one or two.

RECROSS EXAMINATION

BY MR. TUERKHEIMER:

Q The decision to dismantle the courthouse in Superior and to relinquish it to the General Services Administration, who makes that decision?

A That decision was made by the Chief Judge of the District.

Q All right. As far as you know does the Justice Department or the Executive Branch of Government have anything to do with that decision?

A No, they do not. And I'm trying to recall if they were consulted for their advice or views at the time we were considering, the court were considering closing down

three of the four non-Madison locations.

I do not recall if the U. S. Attorney and/or the Marshal's Service were specifically contacted as to their views of the effect of closing down specific locations.

MR. TUERKHEIMER: I don't have any other questions.

MR. LINEHAN: I do have one or two with regard to what was asked by Mr. Tuerkheimer.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. LINEHAN:

Q Were three of the four non-Madison locatio closed down for trial purposes?

A The physical facilities at LaCrosse, Wausau and Superior were all closed down approximately four to five years ago.

Q Which is the non-Madison that wasn't closed down then?

A Eau Claire. We still have court facilities at Eau Claire, Wisconsin.

Q If you know, does this mean as a practical matter that for these four or five years jurors in the LaCrosse, Wausau and Superior Division have not seen jury service in thisDDistrict?

A Petit jurors from those areas have not since the facilities were closed, that is correct.

Q And if you can answer this on your personal knowledge, would it be fair to say that that's based on the terms and provisions of the Plan for the selection of Grand and petit jurors which is used in this District?

A We have had no trials at those locations and, therefore, have summoned no jurors for those locations.

MR. LINEHAN: And I'm only asking, because I don't think the Plan is

a part of the record, is there any objection if we get a copy and make it a part of the record?

MR. TUERKHEIMER: No.

MR. LINEHAN: I think that's a better way to do it. Then I don't have to go into that.

I don't have any more questions.

THE COURT: Okay. Anything further?

MR. TUERKHEIMER: No.

THE COURT: Thank you, Mr. Skupniewitz.

* * *

(Whereupon, said testimony was concluded).

CERTIFICATE

I, Loretta Peters, Official Court Reporter for the United States District Court in and for the Western District of Wisconsin, hereby certify that as such official reporter I was present in said court, throughout its sessions, held in the City of Madison, in said Western District and State of Wisconsin, on Thursday, October 16, 1980; that I then and there reported by machine shorthand the proceedings had on hearing then and there held in the above-entitled criminal action; that I thereafter caused to be prepared, under my personal direction, the foregoing typewritten transcript of said portion of proceedings from my original stenographic notes thereof, so taken at said time and place; that the above and foregoing is a full, true and complete transcript of the portion of proceedings had upon said hearing at said time and place, and is the official transcript thereof.

/s/ Loretta Peters

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. ORDER

ALEX RAINERI, 80-CR-29

Defendant.

This order is designed to ensure compliance with the time limits prescribed in this court's plan for the prompt disposition of criminal cases adopted in accordance with the requirements of the Speedy Trial Act of 1974 (18 U.S.C. Sec. 3161-3174). To ensure compliance with speedy trial requirements, it is essential that the time limits set forth in this order be fully complied with.

The defendant having appeared for arraignment and having entered pleas of not guilty.

IT IS HEREBY ORDERED:

1. That counsel and defendant appear on July 12, 1980 at 1:30 p.m. for a pretrial conference to be held in accordance with Rule 17.1 of the Federal Rules of Criminal Procedure.

2. That no later than July 7, 1980, counsel file and serve any and all pretrial motions including motions for discovery if counsel have been unable to agree on the material which is to be disclosed by each side. If a discovery motion is filed, it shall set forth that a conference was held between a representative of the United States Attorney's office and defense counsel, the name of the persons involved in such conference, and the specific material as to which agreement could not be reached. If a motion to suppress is filed, it shall be accompanied by an affidavit by a person competent to testify to the facts therein, setting forth with particularity the facts upon which the motion is grounded. Briefs, affi-

davits, and other materials in support of any and all pretiral motions must also be filed and served on July 7, 1980.

3. That briefs, affidavits, and other materials in opposition to any and all pretrial motions be served and filed no later than July 18, 1980.

4. That reply briefs on behalf of any moving party be served and filed no later than July 25, 1980.

5. A principal purpose of the pretrial conference is to identify all motions and any other matters that can be decided before trial. In the event that there is need for an evidentiary hearing or argument, a time will be fixed by the magistrate for those further proceedings.

6. Trial in this case is to commence on August 29, 1980.

7. The court will not extend the time set by or pursuant to this order, absent a finding by

by the court that the ends of justice served by such extension outweigh the best interest of the public and the defendant in a speedy trial.

Entered this 23rd day of June, 1980.

/s/ William L. Gansner
WILLIAM L. GANSNER
United States Magistrate